

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO ESQUER,

Defendant and Appellant.

B171956

(Los Angeles County
Super. Ct. No. BA247164)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Mark V. Mooney, Judge. Affirmed.

Cynthia Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, William T. Harter and Juliet H. Swoboda, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant of one count of assault with a deadly weapon by means likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1).¹ The jury found true the allegation that, in the commission of the offense, appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a).

The trial court found true the allegations that appellant had suffered a prior prison term within the meaning of section 667.5, subdivision (b), and two serious felony convictions within the meaning of section 667, subdivision (a)(1); section 1170.12, subdivisions (a) through (d); and section 667, subdivisions (b) through (i). The trial court denied appellant's motion to strike a prior conviction.

Pursuant to the three strikes law, the court sentenced appellant to 25 years to life for the assault with a deadly weapon in count 1. The court imposed a consecutive three years for the personal infliction allegation and five years for each of appellant's two prior serious felony convictions (§ 667, subd. (a)(1)), to be served consecutively to each other and to the term in count 1. The court struck the prior prison term enhancement. Appellant's total prison sentence is 38 years to life.

Appellant appeals on the grounds that: (1) the trial court erred by refusing to exclude evidence of the use of a racial epithet; (2) the trial court violated appellant's right to confront adverse witnesses by excluding certain defense evidence; and (3) the trial court abused its discretion by denying appellant's motion to strike one of his prior felony convictions.

FACTS

We recite the facts in the light most favorable to the judgment below. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Ronny Taylor manages the Dewey Hotel in downtown Los Angeles, where appellant formerly resided. A resident of the hotel, a

¹ All further references to statutes are to the Penal Code unless stated otherwise.

Mr. Mumphrey, informed Taylor that he had seen appellant break a window. Mumphrey lived on the same floor as appellant, as did the victim in this case, Jim Riggins. Riggins and appellant did not socialize, and Riggins had never had problems with appellant.

Taylor informed appellant he was going to be evicted on April 24, 2003. Appellant told Taylor he would leave immediately if Taylor found him another place to live, and Taylor found appellant a place at the Panama Hotel.

On April 26, 2003, Riggins was standing on a downtown corner waiting to catch a bus home. No bus was coming, so he began to cross the street. As he began to step off the curb, he saw appellant swinging an eight-inch to 10-inch knife and coming towards him. Appellant said, "Why did you snitch on me?" Riggins covered his midsection with his arms, and appellant stabbed him in the arm. The knife went through the arm and pierced Riggins's chest. Riggins grabbed appellant's wrists and told appellant he did not know what appellant was talking about. Appellant also said, "I am going to kill you, nigger." The two men tumbled off the curb and began "tussling." Appellant was trying to get on top of Riggins, and Riggins was trying to hold on to appellant to prevent him from stabbing him again. Appellant loosened one of his hands and grabbed the knife from his other hand. He poked Riggins in the arm to try and force Riggins to let go of appellant's other arm. Appellant also stabbed Riggins in the side. In trying to wrest the knife from appellant, Riggins grabbed the blade and cut his finger to the bone. Someone called out that the police were coming, and appellant looked down the street. He stood up, picked up his hat, and made a feint at Riggins as if he would attack him again. Then he turned and walked quickly away.

Riggins walked to a nearby police station where he was treated and taken to a hospital. Riggins underwent surgery and stayed in the hospital until May 1, 2003. At the time of trial, he still suffered ill effects from the stabbing. His arm becomes numb if he lies on it, and he has no feeling in his fingertip. Appellant was arrested on May 6, 2003, in his room at the Panama Hotel.

It was stipulated that on December 18, 1991, Riggins was arrested by a police officer, and he gave his name as Eric Scott. It was also stipulated that Riggins first notified the prosecutor of appellant's use of a racial epithet on the day before trial and that the prosecutor immediately told defense counsel. The parties stipulated that Riggins told Officer Hernandez that his attacker was 30 to 35 years of age and that the attacker used a nine-inch knife.

DISCUSSION

I. Admission of Racial Epithet Uttered During Assault

A. Appellant's Argument

Appellant contends that the evidence he used a racial epithet during the assault was irrelevant. Even if it were relevant, he argues, it should have been excluded under Evidence Code section 352. Appellant claims that the admission of this evidence violated the due process clause of the federal Constitution because any probative value it might have had was substantially outweighed by the danger of undue prejudice. Appellant additionally argues that the admission of this evidence caused the jury to punish appellant for his speech in violation of the First Amendment to the federal Constitution. According to appellant, reversal is required.

B. Proceedings Below

During voir dire, the prosecutor informed the court that Riggins had told him the previous day that, during the stabbing, appellant said, "I am going to kill you, nigger." The prosecutor intended to introduce the statement. The prosecutor had informed defense counsel of the statement as soon as possible. Defense counsel argued that the statement was highly inflammatory, and he asked that it be excluded. The court stated, "I think we recognize the extreme prejudice involved. However, it's also a statement attributed to the defendant and does -- may have some significance and probative value. [¶] I think the appropriate thing is to inquire of the jurors to advise them there may be

such a statement and inquire if that is going to offend them to such a degree or prejudice them to such a degree that it would be difficult for them to be fair in this case.”

When defense counsel protested that Riggins had made no mention of the remark during any prior interview or during the preliminary hearing, the court stated that this point was fertile ground for impeachment. The court said it would “voir dire” the jury on the issue.

When the jury reentered, the court stated, “. . . there is evidence that might come in in terms of a racial epithet that is alleged to have been used by the perpetrator of this crime. . . . [¶] It’s alleged that the person who did this crime used the term nigger. Let me ask all of you whether hearing that term is going to be so offensive to you that you are not going to be able to be a fair and impartial juror in this matter, whether it’s going to make it difficult for you to give a fair trial to Mr. Esquer here who maintains that he’s not responsible for this crime and he’s presumed to be innocent. [¶] Nevertheless, do any one of you think just hearing that term being used is going to cause you such difficulty in being a fair juror? Anyone feel that way at all?” No hands were raised.

Jury selection resumed. After obtaining permission from the court, defense counsel sought out three African-American prospective jurors and asked them to express their thoughts. The prosecutor also addressed these jurors, explaining that no hate crime was alleged in the case. The prosecutor asked the three jurors if they could give appellant a fair and impartial trial and whether they would grant the victim any additional credibility because such a term was used. Subsequently, defense counsel excused two of the three African-American prospective jurors who had been questioned.

During direct examination of Riggins, neither Riggins nor the prosecutor mentioned the epithet. During redirect, however, the prosecutor restated that appellant had asked Riggins during the attack about the reasons for “snitching” on him, and the prosecutor asked Riggins if appellant said anything else to him during the attack. Riggins replied, “No.” The prosecutor asked again, “Did he make any other statements to you

when he was stabbing you?” Riggins then replied, “Yes. Yes, he did.” When asked what the other statement was, Riggins replied, “I am going to kill you, nigger.” Riggins admitted he did not mention the statement to Officer Hernandez, or the district attorney at the preliminary hearing, or the defense attorney during preliminary hearing cross-examination. Riggins believed he had told Detective Becker, the detective who interviewed him.

C. Relevant Authority

Relevant evidence is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “‘Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.’” (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) The trial court has wide discretion in determining the relevance of evidence, but no discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.) This court will not disturb the trial court’s determination unless it clearly has abused its discretion. (*People v. Kelly* (1992) 1 Cal.4th 495, 523.)

Under Evidence Code section 352, a trial court has discretion to exclude otherwise admissible evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice” (§ 352.) The trial court’s discretion to weigh the probative value and prejudicial effect of proffered evidence is broad. (*People v. Gurule* (2002) 28 Cal.4th 557, 655.) We review the admission of evidence for abuse of discretion, i.e., whether the court acted in a manner that is arbitrary, capricious, or manifestly absurd. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) In the event error occurred, we reverse only if it caused an indisputable miscarriage of justice. (*Ibid.*)

D. Evidence Properly Admitted; Any Error Harmless

Although the court did not specify the relevancy of the racial epithet used by appellant, it necessarily found the evidence relevant, since it stated it had probative value.

We conclude that, although the crime in the instant case was clearly not a hate crime, the evidence of the statement, as a whole and in the context of the other statement about snitching, was relevant to appellant's motive in attacking Riggins. The epithet was uttered merely as a form of address, and everything appellant said during the attack was indicative of appellant's motive and formed part of the circumstances of the violent attack perpetrated on Riggins. It has been held that a prosecutor is entitled to elicit the facts surrounding an assault, and racial epithets from a defendant's own mouth are admissible to show the facts surrounding the crime. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1189.) As stated in *People v. Quartermain* (1997) 16 Cal.4th 600 (*Quartermain*), "[t]he unfortunate reality is that odious, racist language continues to be used by some persons at all levels of our society. While offensive, the use of such language by a defendant is regrettably not so unusual as to inevitably bias the jury against the defendant." (*Quartermain, supra*, 16 Cal.4th at p. 628.)

We also conclude the evidence was not unduly prejudicial to appellant's case. In the instant case, as in *Quartermain*, the references to the use of the epithet were only a small portion of the evidence concerning the stabbing of Riggins. The prosecutor did not unduly draw attention to the epithet with follow-up questions -- he merely established that Riggins had not told anyone about this remark before trial. During argument, the prosecutor mentioned the statement only once, in the context of repeating Riggins's stated reasons for not remembering to tell anyone about the epithet. The prosecutor argued that the fact that Riggins had never volunteered the statement before voir dire did not impact the sufficiency of the evidence in the case. The prosecutor did not in any way imply that appellant should be convicted because he is a racist. In closing argument the prosecutor said that the racial remark was "out there" and "it is what it is," but that the case was not a hate crime case. Finally, as the trial court noted, the jurors were informed during voir dire that evidence that the perpetrator of the crime used a racial epithet would probably reach their ears. None of the prospective jurors who remained on the panel

indicated that hearing the term would be so offensive that it would prevent them from being fair and impartial.

Here, as in *Quartermain*, there is no reason to believe the jury convicted appellant for what he *called* Riggins rather than what he *did* to Riggins. (*Quartermain, supra*, 16 Cal.4th at p. 628.) Because we conclude that the trial court did not err in admitting evidence of appellant's use of the racial epithet and that appellant was not unduly prejudiced, appellant's due process claim predicated on this evidence fails, as does his claim that he was punished for exercising his First Amendment rights.

II. Exclusion of Defense Evidence Offered for Impeachment Purposes

A. Appellant's Argument

Appellant argues that he was prohibited from engaging in otherwise appropriate cross-examination intended to show a prototypical form of bias on the part of Riggins, the victim. The trial court's exclusion of evidence that Riggins had used false social security numbers and denied it under oath at the preliminary hearing constituted a violation of appellant's Sixth Amendment right to confront adverse witnesses. Similarly, the court erred in excluding evidence that Riggins had tested positive for cocaine metabolites and opiates in his blood while being treated in the hospital after the incident. According to appellant, the errors were not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

B. Proceedings Below

At a pretrial hearing pursuant to Evidence Code section 402, defense counsel stated that he had asked Riggins at the preliminary hearing if he had ever used a false name and false social security numbers. Riggins denied ever using a false name, and he also denied using false social security numbers, although he subsequently stated he could not recall. Defense counsel said that he wanted to impeach Riggins with the fact that he provided false information to a police officer² and that he lied at the preliminary hearing.

² The information that Riggins had used a false name came from his rap sheet.

The court stated that it did not find *Wheeler*³ impeachment helpful in most cases, particularly when there was going to be felony impeachment of the witness, as in this case. The court said it was not concerned with the giving of false information as much as with the denial of something under oath in a courtroom. With respect to appellant's use of five false social security numbers, the court said it was less concerned about that than the use of a false name for impeachment purposes, since defense counsel was going to impeach Riggins with felony convictions. The court stated, "I think when you start getting into the social security numbers it gets too confusing and time consuming. And I think you are going to have enough impeachment with the felonies."

During trial, the prosecutor informed the court that defense counsel had asked Riggins at the preliminary hearing if he had used any drugs within 24 hours of the incident, and Riggins had denied it. The medical records indicated, however, that on the day he was in the hospital he tested positive for cocaine metabolite and opiates. There was no quantitative analysis determining the amount that was in his blood, however. The prosecutor asserted that the information was insufficient to be used to attack Riggins's credibility or character without some quantitative analysis, and he sought to exclude any questioning of Riggins regarding narcotics use.

The court stated that, unless there was expert testimony to establish the quantity, the information was problematic. Defense counsel argued that the People had not given him the medical records until after the preliminary hearing, and by then there was no longer a sample available. Therefore, he should be allowed to ask the witness. The court ruled that defense counsel could ask only if, at the time of the attack, Riggins was under the influence of any drugs or narcotics.

³ *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*) held that the fact of a misdemeanor conviction is not admissible, even though the conduct underlying the conviction is admissible to impeach a witness or a defendant as long as the conduct has a logical bearing on the individual's truthfulness. (*Id.* at pp. 288, 295.)

C. Relevant Authority

Under the “truth in evidence” section of the California Constitution (art. I, § 28, subd. (d)), all relevant evidence is admissible in criminal cases. (*People v. Harris* (1989) 47 Cal.3d 1047, 1081-1082.) Evidence of a witness’s prior misconduct that involves moral turpitude and hence might suggest a willingness to lie is admissible. (*Wheeler, supra*, 4 Cal.4th at p. 295.)

Although relevant and admissible, impeachment evidence is subject to exclusion in the trial court’s discretion under Evidence Code section 352. “[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.” (*Wheeler, supra*, 4 Cal.4th at p. 296.) Even though a defendant is entitled to an opportunity for effective cross-examination, he is not entitled to ““cross-examination that is effective in whatever way, and to whatever extent,” he might wish. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) The prospect of introducing evidence of a witness’s prior acts of misconduct raises serious problems of proof, unfair surprise, fairness, and efficiency, as well as complicated determinations of when moral turpitude is involved. (*Wheeler, supra*, at p. 297, fn. 7.) Accordingly, courts are admonished to “consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.” (*Id.* at pp. 296-297, fn. omitted.)

D. Evidence Properly Excluded

We conclude the trial court did not abuse its broad discretion under *Wheeler* to exclude the evidence of false social security numbers and Riggins’s blood tests. The court correctly determined that its probative value was outweighed by a substantial danger of confusion of the issues and undue consumption of time. (*Wheeler, supra*, 4 Cal.4th at pp. 296-297.) In the instant case, Riggins was impeached by two prior felony convictions and one conviction for theft under section 484, which he acknowledged. The

jury heard a stipulation that appellant gave a false name to a police officer in the past. Impeachment with the use of false social security numbers would have been cumulative considering the amount of impeachment evidence already presented, and it was also likely to involve undue consumption of time.

With respect to the evidence of Riggins's drug use, the trial court correctly limited defense counsel's inquiry to the time period of the attack. The evidence that certain kinds of narcotics were found in Riggins's blood was more prejudicial than probative because no testing of the levels of the narcotics had been done. There was no means to contradict the denial given by Riggins on the stand, and any further questioning as to Riggins's drug use would have been improper. We conclude that the trial court did not err in limiting the evidence.

We also conclude the trial court did not violate appellant's rights under the Sixth Amendment, since even if the court had allowed the information to reach the jury, no reasonable jury would have received a significantly different impression of Riggins's credibility had the questioning been allowed. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 679-680 [finding a violation of the confrontation clause when a reasonable jury might have received a significantly different impression of witness's credibility had the trial court not prohibited defendant from engaging in otherwise appropriate cross-examination aimed at showing possibility of witness's bias].) “[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.” [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 375.)

III. Trial Court's Refusal to Strike a Prior Conviction

A. Appellant's Argument

Appellant contends the trial court abused its discretion in denying his *Romero*⁴ motion by relying solely on appellant's criminal record instead of engaging in an individualized consideration of the relevant and mitigating factors presented by his case.

B. Relevant Authority

Section 1385 provides that a judge may, on his or her own motion, order an action to be dismissed. (§ 1385, subd. (a).) The Supreme Court of California has stated that the trial court's power to dismiss an action under section 1385 is limited by the "amorphous concept" that requires the dismissal to be "in furtherance of justice." (*Romero, supra*, 13 Cal.4th at p. 530.) The *Romero* court stated that among the most important considerations are not only the constitutional rights of the defendant, but also the interests of society. (*Ibid.*)

The Supreme Court provided additional guidelines for exercising its discretion in *People v. Williams* (1998) 17 Cal.4th 148, 159-161 (*Williams*). It explained that, in making or reviewing a decision to strike a prior offense, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's [the three strikes law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.) The court cautioned that the standard for review of an exercise of discretion is "deferential," although not "empty," requiring the reviewing court to determine whether a ruling exceeds the bounds of reason under the law and relevant facts. (*Id.* at p. 162.)

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

C. Proceedings Below

Defense counsel requested that the court strike one of appellant's priors in a written motion. At the motion hearing, he argued that one of appellant's convictions had occurred many years ago, in February 1980. He stated that appellant subsequently led a crime-free life until his second strike in 1992. Appellant successfully completed parole in both cases. Defense counsel also argued that appellant suffers from mental illness. During one of his incarcerations, appellant was committed to Patton State Hospital for a "long time." Appellant's most recent psychological records show that his diagnosis is schizo-affective disorder with paranoid delusions. The current crime was clearly connected to his mental illness, counsel argued, since any rational person would have realized that the person who caused his eviction was someone who looked nothing like Mr. Riggins. Appellant was apparently under the influence of a paranoid delusion. He has breakdowns when he is not medicated, and this is when he engages in crime. When he is properly treated and medicated, he is able to stay out of trouble. Defense counsel argued that striking one strike would give appellant a determinate sentence that would allow him to reenter society at the approximate age of 70, when he would be highly unlikely to commit crimes. If appellant knew he was likely to get out on a certain date, moreover, it was more likely he would behave and be a good prisoner, which was important to the safety of other prisoners and prison staff.

The prosecution argued that the longest period of time appellant had not been in custody was actually from 1988 through 1992. He violated parole numerous times and engaged in the same type of conduct while on parole as the conduct for which he was convicted; i.e., assault with deadly weapons. In one case, appellant committed a robbery with a knife. The prosecution did not believe a determinate sentence would make any difference. There was no guarantee appellant would take his medication even in his 70's, and appellant had not shown he could control his behavior if not medicated. Moreover, the prosecutor argued, there was insufficient medical information before the court to

allow for a determination that appellant does not engage in the same conduct while medicated.

The court stated that it had considered the arguments of counsel as well as the written materials that had been filed by both parties, and it did not find appellant's case to be an appropriate one for striking a strike under *Romero*. The court noted that the robbery strike was old, but that appellant had not led a crime-free life since then. He suffered a second strike conviction and had been in and out of prison for "looks like all of his adult life," and it was "just not the type of case that I think that the court would be inclined to exercise its discretion and therefore will not be doing so."

D. No Abuse of Discretion

We cannot say the court's ruling was arbitrary or capricious. The probation report reveals that appellant's criminal record begins in 1971 when appellant was not quite 16. He received commitments to camp and CYA, and was finally discharged from parole in 1976 at age 21.⁵ In 1975 and 1976, at the ages of 20 and 21, appellant suffered misdemeanor convictions. In July 1976, he was arrested for assault with a deadly weapon, sentenced in January 1977, paroled in 1978, and returned to prison for a parole violation in 1985. In 1987, 1988, and 1992 he was convicted of misdemeanor offenses, receiving jail time and probation. He was convicted in 1979 of robbery, sentenced to prison in 1980, and paroled in 1984. In 1992, he was again arrested for assault with a deadly weapon and sent to prison for eight years in 1993. He was arrested for spousal abuse in January 2000 and received a parole violation. He was discharged from parole in November 2001, and the instant offense was committed in April 2003.

Appellant's recidivism and the serious nature of his current offense demonstrate that he falls within the spirit of the three strikes law. (See *Williams, supra*, 17 Cal.4th at p. 161.) In addition, the record shows that all of the aspects of appellant's background,

⁵ According to the probation report, appellant was born in October 1955.

character, and prospects were before the court. (*Ibid.*) Absent affirmative evidence to the contrary, the court is presumed to have considered the factors before it. (Evid. Code, § 664; Cal. Rules of Court, rule 4.409.) In *People v. Garcia* (1999) 20 Cal.4th 490, the California Supreme Court stated that, when deciding whether to strike prior convictions under section 1385, the trial court must consider not only the constitutional rights of the defendant, but also the interests of society as represented by the People. (*Garcia*, at pp. 497-498, citing *Romero, supra*, 13 Cal.4th at p. 530.) The court apparently believed appellant was a danger to society, and the record justifies this belief. The court fully complied with section 1385 and the California Supreme Court's holdings in *Romero* and *Williams*.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

NOTT

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST